

IN THE
Supreme Court of the United States
OCTOBER TERM, 1969

No. 388

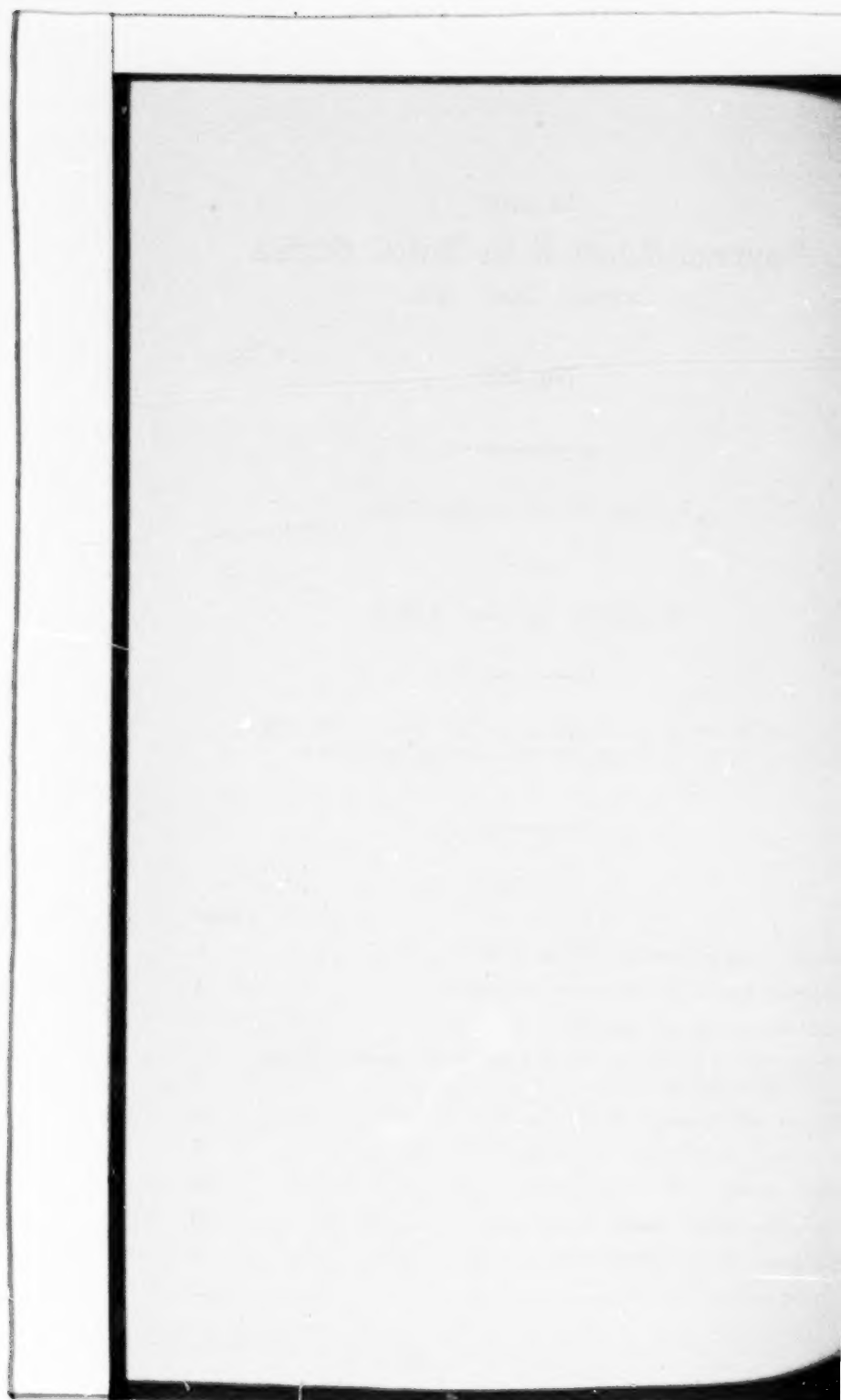
UNITED STATES OF AMERICA,
—v.—
ROOSEVELT HUDSON HARRIS

Petitioner,

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

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**RELEVANT DOCKET ENTRIES
DISTRICT COURT**

DATE FILED	ORIGINAL PAPER
11-13-67	Indictment
11-14-67	Arraignment Order—plea not guilty
11-14-67	Deft's Motion To Suppress. ORDER—hearing on Motion to Suppress; Motion taken under advisement; briefs to be filed 30-30 days.
11-28-67	Cont. to 4-2-68 at 9:30 AM.
1-27-68	Deft's Memo. Brief in support of Motion to Suppress.
2-27-68	Memo. Brief on behalf of United States.
4 -2-68	ORDER-Motion to Suppress is overruled.
4 -5-68	TRIAL ORDER-Deft's Motion to reconsider decision overruling motion to suppress is overruled; Deft's Motion to set aside swearing of jury and to continue case is overruled; Evidence for plf. not concluded; cont. to April 8, 1968 at 9:30 AM.
4 -8-68	TRIAL ORDER-At close plf's evidence, motion for judgment of acquittal overruled; deft's renewed motion to suppress overruled; Evidence for deft. began and cont. to 4-9-68 at 9:30 AM.
4 -9-68	TRIAL ORDER-trial concluded; verdict guilty.
4 -9-68	Jury verdict List of exhibits Envelope containing exhibits
4-11-68	Judgment & Commitment; 2 yrs. impr.
4-11-68	Acknowledgement of Court's Advise of Right to Appeal.
4-11-68	Deft's. NOTICE OF APPEAL
8-20-68	Reporter's Transcript of Testimony and Proceedings at Hearing On Motion to Suppress Evidence.

RELEVANT DOCKET ENTRIES
COURT OF APPEALS

DATE FILED	ORIGINAL PAPER
4-12-68	Duplicate copy of Notice of Appeal and docket entries
8-30-68	<i>Certified record</i> (1 vol. pleadings, transcript and exhibits), filed; and cause docketed
12-17-68	Twenty-five copies of Brief and Appendix for Appellee
12-18-68	Proof of service of brief for Appellee
4 -8-69	Case submitted on briefs without oral argument (Before: Weick, O'Sullivan and McCree, JJ.)
5-28-69	Judgment of the District Court reversed and case remanded
5-28-69	Opinion Per Curiam (McCree, J.)
6-18-69	Mandate issued (No costs taxed) Opinion with mandate
6-30-69	Copy of letter from Clerk of Supreme Court to Solicitor General of the United States advising that an extension of time was granted on 6/26/69 for filing petition for writ of certiorari until July 26, 1969

Eastern District of Kentucky,
Affidavit for Search Warrant

Form A. O. 106

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

June 20, 1967, Davis T. McGarvey, Clerk,
U. S. District Court

Commissioner's Docket No. 5

Case No. 180

UNITED STATES OF AMERICA

vs.

ROOSEVELT HARRIS

AFFIDAVIT FOR SEARCH WARRANT

Before: KELLY CLORE, Commissioner, Pineville, Kentucky.

The undersigned being duly sworn deposes and says:

That he (has reason to believe) that (on the premises known as) The Roosevelt Harris residence, a 5 or 6 room green sided frame dwelling, and including a red sided outbuilding located about 10 yards from the residence and known as the "Dance Hall", and another outbuilding, and a number of vehicles, the buildings containing basements and attics, and all other appurtenances, these buildings being located at 310 Dansbury Avenue, the 2nd dwelling on the left of Dansbury when approached from North 15th Street, in the City of Middlesboro, Bell County, Eastern District of Kentucky, there is now being concealed certain property, namely Non tax-paid distilled spirits in containers not bearing internal revenue stamps as required by law, which are fit and intended for use in violation of title 26, USC as amended, section 5604(a) (1).

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: Roosevelt Harris has had a reputation with me for over 4 years as being a trafficker of nontaxpaid distilled spirits, and over this period I have received numerous information from all types of persons as to his activities. Constable Howard Johnson located a sizeable stash of illicit whiskey in an abandoned house under Harris' control during this period of time. This date, I have received information from a person who fears for their life and property should their name be revealed. I have interviewed this person, found this person to be a prudent person, and have, under a sworn verbal statement, gained the following information: This person has personal knowledge of and has purchased illicit whiskey from within the residence described, for a period of more than 2 years, and most recently within the past 2 weeks, has knowledge of a person who purchased illicit whiskey within the past two days from the house, has personal knowledge that the illicit whiskey is consumed by purchasers in the outbuilding known as and utilized as the "dance hall", and has seen Roosevelt Harris go to the other outbuilding, located about 50 yards from the residence, on numerous occasions, to obtain the whiskey for this person and other persons.

RUSSELL R. BAUER,
Special Investigator, A&TTD.

Sworn to before me, and subscribed in my presence,
17th of June, 1967.

KELLY CLORE,
United States Commissioner.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

(At London, November 28, 1967)

No. 14440

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ROOSEVELT HUDSON HARRIS, DEFENDANT

TRANSCRIPT OF TESTIMONY AND PROCEEDINGS
AT HEARING ON MOTION TO SUPPRESS EVIDENCE

APPEARANCES:

For the United States:

MR. JAMES F. COOK, Assistant U. S. Attorney
MR. G. WIX UNTHANK, Assistant U. S. Attorney

For the Defendant:

MR. JOHN J. TRIBELL, Middlesboro, Kentucky

UNITED STATES DISTRICT COURT
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APPEARANCES:

For the United States:

MR. JAMES F. COOK, Assistant U. S. Attorney

For the Defendant:

MR. JOHN J. TRIBELL, Middlesboro, Kentucky

[fol. 2] Case No. 14440, styled United States of America v. Roosevelt Hudson Harris, was called for hearing on defendant's motion to suppress in the United States District Court for the Eastern District of Kentucky, at London, on November 28, 1967, before His Honor, Bernard T. Moynahan, Jr., Judge of said Court.

THE COURT: All right, the United States v. Roosevelt Harris—let the record show the defendant and his counsel are in the courtroom and the attorney for the United States is in the courtroom. I heard you gentlemen yesterday on this matter. I understood that you possibly desired to introduce some evidence, Mr. Tribell—is that right?

MR. TRIBELL: Your Honor, prior to introducing evidence I would like to clarify the position that I have taken here, which seems to be somewhat in alight confusion based upon the way this motion to suppress the evidence is concerned. In this case the federal officer, Mr. Bauer, went to the office of the United States Commissioner, Mr. Kelly Clore, at Pineville and, if you have the record in front of you there, you will see that he [fol. 3] obtained a search warrant against premises of the residence of Roosevelt Harris, and he describes it as a 5 or 6 room green sided frame dwelling, and including a red sided outbuilding located about 10 yards from the residence and known as the "Dance Hall," and another outbuilding, and a number of vehicles. The buildings contain basements and attics and all other appurtenances, these buildings being located at 310 Dansbury Avenue. Now with respect to what Paragraph 3 of my motion to suppress—in Paragraph 2 I state that the affidavit and warrant does not properly describe the premises to be searched. It appears that this warrant served by the officers was served on Roosevelt Harris at his residence at a place where he had a lawful right to be. As a matter of fact, as some of the evidence developed in the case tried yesterday against Anna Kate Taylor, the warrant was read to Mr. and Mrs. Harris inside their premises at the kitchen table. Now this question raised with regard to Paragraph 3 and the inferences brought up there, it applies, I think, to a person who is a guest at another person's house and who are not the owners of the premises. Now the officers might have wandered off the premises onto other premises, and for that reason I want to point out that I think my motion is well taken if they searched some other place other than at the property located at 310 Dansbury Avenue.

[fol. 4] THE COURT: Well, you say in ground 3 of your motion that the alcoholic beverages were not found on the defendant's premises but on the premises of a neighbor. Now can you question the warrant for and on behalf of the neighbor?

MR. TRIBELL: No, but he is here charged with the fruits of the alleged search. Now the United States re-

lied upon Jones v. United States—the Government said that the Court said this:

“No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress when its fruits are proposed to be used against him. This would, of course, not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched.”

Now here they found alcoholic beverages which we allege were on premises not owned or under the control of Mr. Harris here, but the fruits of this search precipitated the officers coming before the Federal Grand Jury and obtaining an indictment against Roosevelt Harris charging him with possession of 6 9/16 gallons of untaxed [fol. 5] alcoholic beverages. Now this search started on his premises and if the affidavit in the search warrant is ruled to be a proper affidavit, then he was properly served, but the officers in their search wandered beyond the confines of his premises and onto another address on Dansbury Avenue.

THE COURT: Well, are you still insisting that the distilled spirits, if any, were found at somebody else's property?

MR. TRIBELL: Well, Your Honor, is there any reason why that the Court would not rule upon and let me make a further comment on Paragraph 1 of my motion to suppress before we get to the other paragraph? If Paragraph 1 is sufficient to—

THE COURT: Well, Paragraph 1, in the opinion of the Court, would raise no issue if the search was made of somebody else's premises. Suppose officers would come to my house with a search warrant and instead of searching my house, they go over and search my neighbor's house and find something. Do I have any standing to complain about that?

MR. TRIBELL: Well, according to the Jones case, when the fruits are proposed to be used against you to

make a prosecution against you, I think you have a right. The Court said Evans' consent to the presence [fol. 6] in the apartment, he was entitled to have the merits of his motion to suppress adjudicated, even though he was a guest there, but he was lawfully there, even though—

THE COURT: Yes, he was a guest, but you say this man wasn't at the premises and didn't have any control over them or have any connection with them, don't you?

MR. TRIBELL: Well, this—

THE COURT: No, just answer me that? Don't you?

MR. TRIBELL: I say that he didn't have any control over the premises where the alcoholic beverages were found.

THE COURT: And he wasn't there.

MR. TRIBELL: He was in his own home when the warrant was served on him, and the warrant was served on him and the warrant specified—

THE COURT: Let me ask you—suppose I take 10 gallons of whiskey and take it over to my neighbor's house and put it in the basement, and they come with a search warrant and they search my house, and then they go over and search my neighbor's house; do I have a right to question the validity of the search warrant if they attempt to introduce in evidence against me what was found at my neighbor's house?

[fol. 7] MR. TRIBELL: Yes, sir, I think that is properly expressed, when the fruits of the search are proposed to be used against you. Suppose your neighbor had ten gallons of whiskey in his house; they come with a search warrant describing your house, and then after they finish that, they wander off and search through the yard and the outbuildings there and wander across the road and search a neighbor's house, then propose to use the fruits of the search in the prosecution against you, then I think that the motion to suppress should properly be considered.

THE COURT: It says this in the Jones case:

"Distinctions such as those between 'lessee,' 'licensee,' 'invitee' and 'guest,' often only of gossamer

strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards."

"No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. [fol. 8] This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched. As petitioner's testimony established Evans' consent to his presence in the apartment, he was entitled to have the merits of his motion to suppress adjudicated."

Now as I understand you in the third ground of your motion, you say this:

"The alcoholic beverages allegedly found by the officers executing the warrant were not found on the premises of the defendant, but on the premises of an adjoining neighbor."

Now was the defendant there:

MR. TRIBELL: He accompanied them through the search.

THE COURT: No, I didn't ask you that. Was he on the adjoining premises?

MR. TRIBELL: No, sir.

THE COURT: What says the United States?

MR. COOK: I might make this observation with respect to the illustration that the Court has given there of one defendant taking certain contraband to the property of a friend and leaving it there, and as to whether or not that person would have a standing to object to [fol. 9] a search of this friend's apartment. The Supreme Court, it seems to me, has said about the same thing in the case of *Wong Sun v. United States*, a 1963 case, reported in 371 U.S., Page 471. That was a narcotics prosecution. The Court said:

"A defendant who was convicted was held to lack standing to object to the illegal seizure of narcotics from a co-defendant's apartment."

I think that's the same thing as the Court illustrated. The motion to suppress has alleged that these alcoholic beverages were not on the premises of the defendant but on the premises of an adjoining neighbor. We know of no authority by which the defendant would have a standing to object to any search and seizure of property found on the premises of an adjoining neighbor. The Jones case, I believe, authorized the defendant there to have his motion to suppress adjudicated, saying that he had standing because he was on the premises which were searched, and from which the contraband was seized.

MR. TRIBELL: Your Honor, in response to that I would like to interject this. If that is the case, a totally incompetent and invalid affidavit and search warrant can be used or can be the basis and the authority for an officer going to premises and then searching the premises; when he finds nothing there, goes to a neighbor's, and then charges back the defendant, the person who is named in the search warrant, and used the fruits of the search of the contraband found at a neighbor's house in a prosecution against him; and in that event he would never have an opportunity to determine the integrity or validity of the search warrant. However, I do wish to introduce some proof on this question of whether or not it was on premises owned or under his supervision.

THE COURT: Well, you say it wasn't.

MR. TRIBELL: That's what he tells me, it wasn't.

THE COURT: All right, call your witness.

MR. TRIBELL: I would like to call Mr. Bauer.

TESTIMONY FOR THE DEFENDANT

The first witness called on behalf of the defendant was

RUSSELL R. BAUER

who, being first duly sworn, testified as follows:

[fol. 11] **DIRECT EXAMINATION**

BY MR. TRIBELL:

Q. 1. State your name, please.

A. Russell R. Bauer.

Q. 2. You are a Special Agent for the Alcohol and Tobacco Tax Division of Internal Revenue?

A. I am.

Q. 3. Mr. Bauer, you were such an officer on June 17, 1967?

A. I was.

Q. 4. And in the course of the performance of your duties did you have an occasion to obtain a search warrant and go to the premises of the residence of Roosevelt Harris?

A. I did.

Q. 5. Do you recognize Roosevelt Harris in the courtroom?

A. Yes, sir.

Q. 6. Is he the man sitting next to me?

A. He is.

Q. 7. And upon entering his premises did you or one of your co-workers, your buddies, or whoever worked with you, worked in the Alcoholic Tobacco Tax Division, go with you?

A. Yes, sir.

[fol. 12] Q. 8. And did one or both of you explain to Mr. Harris that you had a search warrant for his premises and read the warrant to him?

A. The announcement that we were federal officers with a search warrant was made at both front and rear doors before entry was gained into the residence. After that time if the search warrant was read, it was not read by me nor in my presence.

Q. 9. Who was the federal officer that was with you?

A. Special Investigator Easley.

Q. 10. Did you give, or was Roosevelt Harris given a copy of this search warrant?

A. Yes, sir, he was.

Q. 11. What did you find at the premises of Roosevelt Harris?

A. Within the premises itself was a one-half pint bottle of non-tax-paid distilled spirits; a one gallon jug in the sink with a broken top, partially filled with a dilute non-tax-paid distilled spirits.

Q. 12. Did you have that analyzed?

A. I did.

Q. 13. Is the person or persons who performed this analysis present here today?

A. Mr. Derr, the chemist, is here. I don't know of [fol. 13] my own knowledge that he made the analysis.

Q. 14. Mr. Who?

A. Mr. Derr, D-e-r-r.

Q. 15. All right, after you searched, did you search—

THE COURT: Mr. Deer.

THE WITNESS: Mr. Deer—I'm sorry.

THE COURT: All right, go ahead.

MR. TRIBELL: Beg your pardon?

THE WITNESS: It's Mr. Deer.

Q. 16. Did you search the inside of the premises further—the house?

A. Yes, sir.

Q. 17. And the only thing that you found within the walls, the four walls of this house, was one-half pint of untaxed whiskey and a dilute, I believe you call, in a broken jug in the sink with a broken neck.

A. That's correct.

Q. 18. The main body of the jug was intact—is that correct?

A. Yes, sir.

Q. 19. Now in furtherance of your search did you go outside and search under the house or about the house?

A. I did, yes, sir.

[fol. 14] Q. 20. And did you find anything else in performing this search there at the premises?

A. Not under the house or immediately about the house, no, sir.

Q. 21. How far away from the house did you find anything else, if you did?

A. I found one sack containing three gallons of non-tax-paid distilled spirits thirty paces from the rear door of the residence; one sack containing three gallons of non-tax-paid distilled spirits thirty-six paces from the rear door of the residence.

Q. 22. Do you remember the geographical appearance of this area in which you searched?

A. I do.

Q. 23. I am going to use this board here and see if I can make a diagram of it and ask you if this is essentially what you found.

A. I have already made a diagram of it.

Q. 24. Would you let me see a copy of your diagram?

A. Yes. I believe I have it with my case report.

Q. 25. Did you make this diagram while you were there or after you had left there?

A. I made it very shortly after I had left.

[fol. 15] Q. 26. Did you step off the measurement of the paces from the rear of the house, you say?

A. I did, yes, sir.

Q. 27. Well, I am somewhat confused by your diagram, sir. I would like to put one on here and ask you if that is a reasonable facsimile of what you have here. Fifteenth Street runs this way and Dansbury runs perpendicular to Fifteenth Street—is that correct?

A. That's correct. That would be North Fifteenth Street.

Q. 28. Now Dansbury Avenue runs directly to the canal—is that correct?

A. Yes, sir.

Q. 29. And the canal runs something like this to the end of Dansbury Avenue—is that correct?

A. That would be—yes, sir.

Q. 30. No bridge there, is there?

A. Not that I know of.

Q. 31. When you get to the end of Dansbury Avenue, Mr. Harris' house is the last house on the left—is that correct?

A. There is a small shack, or what is known as the dance hall, which would be closer to the canal than his house.

Q. 32. Does it sit something like this, and then his house like this?

[fol. 16] A. Not quite. If that small block is the dance house, it would be up closer to being parallel with the front porch of the house. It would be up alongside the house.

Q. 33. Up this way?

A. No, sir, towards the canal, right in that section there. That's it. Roughly that would be it, yes, sir.

Q. 34. Now is there a house directly across the street here?

A. There is an abandoned house there, yes, sir.

Q. 35. How do you know it's abandoned?

A. Well, the five years I've been in Middlesboro I have never seen any activity nor life in the house.

Q. 36. How many times have you been there in the last five years?

A. Numerous times.

Q. 37. Is there a house located right here beside this, or a shack here beside this abandoned house?

A. Not that I recall.

Q. 38. Now will you come down here and point out on this diagram where you found the alcoholic beverages that you spoke of in your testimony?

[fol. 17] A. This would be North Fifteenth Street; this would be Dansbury Avenue. Here is a house situated here on the corner facing Dansbury Avenue. By clock on my autometer on my vehicle it is 1/20 of a mile from this point to Roosevelt Harris' driveway. There is some type of road which breaks off Dansbury Avenue at this point. This is all a weeded lot. This section here is a weeded lot. The driveway to Mr. Harris' house comes in on this side, or the North Fifteenth Street side of his house. Behind his house, as I recall, there was an outbuilding in this area, there was an outbuilding in this area, and his driveway terminated in this general vicinity. There was an outside toilet in this area, as I recall. There was a branch of water which ran in that direction.

There was high foliage, over six feet. It would be higher than I—which covered this section in here along the creek branch, or the branch bank. There was high foliage along behind this particular outbuilding, which went off in this direction and which enclosed this particular area in here, which was of worn grass. It was not high growth in this area in here. When I first left the premises, I followed a path that went directly to the outside toilet. From there I followed a path through this foliage and it was the only opening that I found through the [fol. 18] foliage. This came into this section here. At this point here I joined Constable Johnson, and from this point here in this foliage at this point, or approximately, I found one sack containing three one-gallon jug. There was another path going in this general vicinity. There were matted-down places in the foliage but nothing there. There was a path that came off in this direction and within the foliage here there was a matted-down place and at that point I found another sack. I returned out this path and followed a well-worn path that brought me directly back to here. My paces were counted from this point up to this point and to the house and from this point up to this point and to the house.

Q. 39. Now do you know what the house number here and lot number?

A. No, I don't. 310, I believe, it is listed as.

Q. 40. Well, anything that you found outside the Roosevelt Harris house was found over on the next lot was it not?

A. I don't know whose property it is. I followed a path from the defendant's home to that area.

Q. 41. How far would you say it is from right here to where you enter the driveway?

A. It would be approximately four car lengths. As [fol. 19] recall, there were three cars parked in the driveway and a broken down Oldsmobile was towards the rear of the house. And the driveway was pretty well filled when we got our car into it.

Q. 42. Would you say it was 100 feet approximately?

A. Yes, I would judge it to be 100 feet.

Q. 43. Then from right here to this point here, how many steps?

A. Thirty-six paces.

Q. 44. And approximately three feet a pace?

A. Yes, sir.

Q. 45. Then it would be approximately 208 feet from this point here to this point here, in your judgment—is that correct?

A. Well, we deducted the paces from the stash to that center point there that you are talking of. That would take off perhaps six or eight paces.

Q. 46. You found one sack in here, in this foliage here?

A. That's right.

Q. 47. How far was it from here to here?

A. I didn't pace that. I paced the total distance.

Q. 48. Did you pace the distance from here to here?
[fol. 20] A. No, sir. I paced the distance from each one to the house, although it was on a common path for the majority of the distance.

Q. 49. Did you look in this property over here?

A. I did not.

Q. 50. Was there any shacks or anything in this area here?

A. No, that's all cleared within that foliage. There are two outbuildings before you get to it. That's one, yes, sir.

Q. 51. This one?

A. That would be one.

Q. 52. Do you know who owns this outbuilding?

A. No, sir, I don't.

Q. 53. Did you find anything in this outbuilding up here next to the canal?

A. In the dance hall? I didn't enter that building. I looked through the windows; however, I didn't see anything. It was fairly well cluttered up with junk, as I recall.

Q. 54. Did you find anything in this outbuilding here?

A. No, sir.

Q. 55. Anything in the privy out back?

A. No, sir.

[fol. 21] Q. 56. You prepared all this information on here, did you not?

A. What is that you are holding?

Q. 57. On the affidavit?

A. I did.

Q. 58. And you took this affidavit with your signature on it to Mr. Kelly Clore and he acknowledged your signature—is that correct?

A. I signed it and swore to it in the presence of Kelly Clore.

Q. 59. And then upon the strength of this affidavit you already had a search warrant prepared, did you not?

A. I had prepared the search warrant, yes, sir.

Q. 60. And on the strength of your signing and swearing to this he issued the search warrant?

A. Kelly Clore asked me certain questions before he did.

Q. 61. Now can you tell the Court whether or not the area in which you found a little over six gallons of spirits, whether or not that was on property located at 310 Dansbury Avenue?

A. Not of my own knowledge I cannot.

Q. 62. How much alcoholic beverages did you say [fol. 22] you found in this first area right here?

A. Three one-gallon jugs.

Q. 63. Three gallons?

A. Yes, sir.

Q. 64. How much did you find up here?

A. Three gallon.

Q. 65. And I noticed you testified that you located 6 9/16 gallon there.

A. Yes, sir.

Q. 66. Where did this other 9/16 of a gallon come from?

A. 1/16 would have been the half-pint within the residence; the half-gallon, which was contained within the jug broken in the sink.

Q. 67. Did you charge him with possession of untaxed spirits?

MR. UNTHANK: Object.

THE COURT: Overruled.

Q. 68. In the possession of the one-half pint found inside the premises?

A. Did I charge him with possession of the one-half pint?

Q. 69. Yes, sir.

A. It was encompassed in the total charge.

Q. 70. And he was the only one charged?

[fol. 23] A. Roosevelt Harris was the only one charged of whiskey in this investigation.

Q. 71. Did you have any conversation with him about this whiskey?

A. After he had been advised of his rights, yes, sir.

MR. TRIBELL: I believe that's all.

THE COURT: Anything else?

MR. COOK: No, I have nothing.

THE COURT: All right, step down, Mr. Bauer. Call another.

MR. TRIBELL: Your Honor, may I approach the Bench?

THE COURT: Yes, come up.

The following occurred at the Bench:

Mr. TRIBELL: In light of the testimony of Officer Bauer that he charged the defendant, Roosevelt Harris, with possession of untaxed beverages, namely, the one-half pint found within the confines of the defendant's home, and further confiscated what [fol. 24] he refers to as a diluted substance containing a residue of evidence of untaxed liquor, the defendant moves to strike the third ground alleged in his motion to suppress as a ground for the motion to suppress, but in the event of a trial of this case not as a defense.

THE COURT: What do you want to do, eat your cake and have it, too?

MR. TRIBELL: Your Honor, it is very plausible that I can prove that—I think the affidavit—

THE COURT: Is this what you want to do—you want the motion to suppress to be sustained and then you are going to say it's Roosevelt Harris' property and it wasn't good? Is that right?

MR. TRIBELL: If the motion be sustained, I will say it was Roosevelt Harris' property?

THE COURT: Is that what you want to do?

MR. TRIBELL: No, what I want to do, I want to hear—

THE COURT: Well, are you withdrawing the third ground of your motion?

[fol. 25] MR. TRIBELL: As a ground for my motion to suppress, yes, sir.

THE COURT: All right, Gentlemen, I will hear you on it. All right, any further evidence?

MR. TRIBELL: No, sir.

MR. COOK: I stated yesterday to the Court the position of the United States with respect to the affidavit, and it would be repetitious for me to go over that again in any detail. We submit that the affidavit perhaps finds its basis on hearsay, but that the hearsay is sufficiently corroborated by the testimony of the affiant as to reputation. And for those reasons and the other reasons stated to the Court yesterday we submit that the affidavit is sufficient to support the search warrant.

THE COURT: Well, does the affidavit say in there anywhere that this person had heretofore given reliable information, or is a reliable informant? It says it's a prudent person, but there is no showing of this person's history.

MR. TRIBELL: None.

THE COURT: Is there?

[fol. 26] MR. COOK: Well, of course in that respect the person who is unidentified, there is no information given as to his history except—

THE COURT: That he is a prudent person.

MR. COOK: Prudent person and has given this information to the affiant under oath. However, the other

informant of the affiant—that is, Constable Howard Johnson—has been identified and we think it is not necessary in that circumstance to give as much information, if any, about his reputation.

THE COURT: Of course it says: "Constable Howard Johnson located a sizeable stash of illicit whiskey in an abandoned house under Harris' control during this period of time." That could be any time within the past four years if it be connected to the preceding sentence.

MR. COOK: That's true, but we think it becomes timely when connected with the other information received by the affiant.

THE COURT: I am inclined to think, under these cases that we discussed here earlier today, that the reliability of the informant must be set out.

MR. COOK: I don't think there is anything more that I can say. The affidavit, as I believe—

THE COURT: As I understood this case when it [fol. 27] started, search was made there, the defendant said, of somebody else's property, but it develops that part of it came out of the house, part of it came out of the field back there behind the house. I don't know whose field it was, whether it was part of the curtilage or whether it was somebody else's property. There has been no showing whose property that was. Of course it might not have even been necessary to have a warrant to search that property. Isn't this affidavit all hearsay, Mr. Cook, with no showing as to the reliability of the informant? Doesn't it boil down to that?

MR. COOK: Basically that's right. We just submit that it is corroborated by the reputation that this defendant had with the affiant.

THE COURT: Well, let me ask you this, Gentlemen—hasn't this jury panel heard too much in this case to try this case, regardless of the outcome of the ruling on this motion?

MR. UNTHANK: Yes, Your Honor.

THE COURT: They have heard the Anna Kate Taylor case tried here and this defendant has testified as a witness. The other jurors were here in the courtroom. The testimony was introduced that they went to this

defendant's house and searched the house and found a half-pint of distilled spirits and an attempt was made [fol. 28] by the defendant's daughter to break this jug of whiskey. What do you have to say about that, Mr. Tribell? You challenge the panel in the event the case goes to trial?

MR. TRIBELL: If Your Honor overrules my motion, yes, sir, I would have to.

THE COURT: Well, I am considering taking your motion under advisement with the thought that it couldn't be tried before this jury at this session of court, anyway.

MR. TRIBELL: Well, I had that in mind, Your Honor. I had discussed it with the United States Attorney.

THE COURT: If I understand you correctly, as attorney for the defendant you make the issue that it couldn't be tried at this session of court before this jury panel, if the motion should be overruled—is that right?

MR. TRIBELL: Yes, sir, that is correct.

THE COURT: Well, on that state of affairs I see where no prejudice could result to the defendant by taking it under advisement. I will take it under advisement and let the case be continued until the second day of the next term of the court. Yes, Mr. Unthank?

MR. UNTHANK: May I also move the Court that [fol. 29] the counsel for the defendant submit a memorandum opinion and the United States be given thirty days in which to—

THE COURT: All right, I will give each side thirty days to submit a memorandum. You submit yours first, Mr. Tribell, and I will give the United States thirty days to respond. There is a very close question here.

MR. TRIBELL: Is that thirty days from today, Your Honor?

THE COURT: Thirty days from today. All right, let this case be continued until April 2, 1968 at 9:30 A.M.

I, Edna F. Darnell, Official Reporter for the United States District Court for the Eastern District of Kentucky, hereby certify that the foregoing is a true and correct transcript of the testimony and proceedings at a hearing on defendant's motion to suppress evidence in Case No. 14440 on the London docket, styled United States of America v. Roosevelt Hudson Harris, in the United States District Court, London, Kentucky, on November 28, 1967, before His Honor, Bernard T. Moynahan, Jr., Judge of said Court.

IN TESTIMONY WHEREOF, witness my hand this August 20, 1968.

/s/ Edna F. Darnell
Official Reporter

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18961

[Filed May 28, 1969, Carl W. Reuss, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ROOSEVELT HUDSON HARRIS, DEFENDANT-APPELLANT

Decided May 28, 1969

*On Appeal from the U. S. District Court for the
Eastern District of Kentucky at London*

Before WEICK, Chief Judge, O'SULLIVAN and MCCREE,
Circuit Judges.

PER CURIAM: Appellant was convicted of possessing non-tax-paid distilled spirits in violation of Section 5205a (2) of the Internal Revenue Code of 1954 and sentenced to two years in prison. The sole question on appeal is the sufficiency of an affidavit used to obtain a search warrant, the execution of which resulted in the discovery of approximately six gallons of whiskey on and about appellant's premises. The District Judge denied a motion to suppress this evidence, rejecting appellant's contention that the affidavit failed to establish probable cause.

The affidavit contained the following recitals: 1) during the past four years, the appellant had a reputation with the affiant of being a trafficker in non-tax-paid whiskey; 2) some time during this four year period a constable had located a cache of whiskey in an abandoned house which was under appellant's control; and 3) an informer who the affiant "found * * * to be a prudent person" had told the affiant, as of the date of the affidavit, that he (the informer) "has personal knowledge of and has purchased illicit whiskey from within the residence [of appellant] for a period of more than 2 years, and most recently within the past 2 weeks," and

that he knew of another person who purchased illicit whiskey at appellant's residence within the past 2 days.

The Supreme Court has held that an affidavit based on hearsay information may establish the probable cause requisite to the issuance of a search warrant if the issuing magistrate is:

informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant * * * was "credible" or his information "reliable." *Aguilar v. Texas*, 378 U.S. 108, 114 (1964). *Accord, Spinelli v. United States*, 37 U.S.L.W. 4110 (U.S., Jan. 27, 1969).

This court recently applied the test enunciated in *Aguilar*, and decided that "a declaration in the affidavit that the informant visually observed the fact asserted therein would suffice to establish the probability of its existence, provided there was also a substantial basis for confirming the credibility of the informant." *United States v. Kidd*, No. 18465 (6th Cir., Feb. 25, 1969). In *Kidd*, the previous reliability of the informant served to confirm his credibility.

A declaration that the informer has purchased whiskey directly from the suspect at his residence is tantamount to an assertion of visual observation by the informer. There is, however, nothing in the affidavit used in this case which would provide a "substantial basis for confirming the credibility of the [unidentified] informant." No information is provided which would enable the magistrate to assess his reliability or trustworthiness. The allegation that he is a "prudent person" signifies that he is circumspect in the conduct of his affairs, but reveals nothing about his credibility. Thus, the information received from the informer was not sufficient to establish probable cause for the issuance of the search warrant.

Of course, in *Spinelli, supra*, the Supreme Court held that, "If the tip is found inadequate under *Aguilar*, the other allegations which corroborate the information contained in the hearsay report should then be considered."

37 U.S.L.W. at 4112. We have done this, and we find the other declarations in the affidavit concerning appellant's reputation and the previous experience of a constable insufficient independent corroboration to overcome the inadequacies related to the informer's credibility. The assertion that appellant had a reputation with the affiant of being a trafficker in illegal whiskey would not, standing alone, establish probable cause. And the Supreme Court has held that this type of statement may not be used "to give additional weight to allegations that would otherwise be insufficient." *Spinelli v. United States*, 37 U.S.L.W. at 4113. The statement concerning the constable's discovery of a cache of whiskey gives no indication when, during the previous four years, this episode occurred. Reliance on this assertion would violate the principle that "probable cause must be determined as of the time the warrant is issued." *Schoeneman v. United States*, 317 F.2d 173, 177 (D.C. Cir. 1963).

Since the affidavit was insufficient to establish probable cause, issuance of the warrant was improper and the evidence obtained should have been suppressed. The judgment of the District Court is therefore reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18961

[Filed May 28, 1969, Carl W. Reuss, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

ROOSEVELT HUDSON HARRIS, DEFENDANT-APPELLANT

Before: WEICK, Chief Judge, O'SULLIVAN and MCCREE,
Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was submitted on briefs without oral argument.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed.

No costs awarded. Rule 39(b).

Entered by order of the Court.

CARL W. REUSS,
Clerk.

Issued as Mandate: June
18, 1969

COSTS: NONE

Filing fee _____ \$_____

Printing _____ \$_____

Total _____ \$_____

A True Copy.

Attest:

CARL L. REUSS,
Clerk.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

Indictment No. 14440

UNITED STATES OF AMERICA, PLAINTIFF

—vs—

ROOSEVELT HARRIS, DEFENDANT

Comes the defendant and moves the court to suppress the evidence in the above styled and numbered action for the following reasons:

(1) The affidavit contained in the search warrant is improper and irregular because it is primarily based on hearsay information and does not contain sufficient information upon which a search warrant could or should have been issued.

(2) The affidavit and warrant does not properly describe the premises to be searched.

(3) The alcoholic beverages allegedly found by the officers executing the warrant were not found on the premises of the defendant but on the premises of an adjoining neighbor.

(4) The affidavit does not state the reputation of the informant upon which the Special Investigator based his information.

WHEREFORE, the defendant moves the court to suppress the evidence in the above styled and numbered action.

This 14th day of November, 1967.

/s/ John J. Tribell
JOHN J. TRIBELL
Attorney for defendant
Middlesboro, Kentucky

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

No. 14,440

U. S. OF AMERICA, PLAINTIFF

vs.

ROOSEVELT HUDSON HARRIS, DEFENDANT

ORDER

On April 2, 1968, it was ORDERED herein as follows:

- (1) That the defendant's Motion to Suppress be and it is overruled.
- (2) * * *

/s/ Bernard T. Moynahan, Jr.
BERNARD T. MOYNAHAN, JR.
Judge

April 2, 1968

JUDGMENT AND COMMITMENT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
LONDON

No. 14,440

UNITED STATES OF AMERICA

v.

ROOSEVELT HUDSON HARRIS

On this 11th day of April, 1968 came the attorney for the government and the defendant appeared in person and by counsel, John Tribell, a regular practicing attorney of this court.

IT IS ADJUDGED that the defendant has been convicted upon Verdict of guilty of the offense of Possessing distilled spirits in unstamped containers, in violation of Section 5205a(2), 1954 Int. Rev. Code, as amended as charged in the Indictment and the court having asked the defendant whether he or his attorney have anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted. Thereupon the Probation Officer submitted a pre-sentence report to the Court.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) Years.

IT IS ADJUDGED that the defendant be imprisoned until he is otherwise discharged as provided by law.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Bernard T. Moynahan, Jr.
United States District Judge

SUPREME COURT OF THE UNITED STATES

No. 388, October Term, 1969

UNITED STATES, PETITIONER

v.

ROOSEVELT HUDSON HARRIS

ORDER ALLOWING CERTIORARI—Filed February 24, 1970

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.